Supreme Court, Hawaiian Islands.

D. M. CROWLEY vs. HAWAIIAN GAZETTE COMPANY, LIMITED.

MR. JUSTICE MCCULLY PRESIDING.

JANUARY 30, 1891.

CHARGE OF THE COURT.

THE COURT: There is no doubt, gentlemen of the jury, that a case of this description should be tried carefully, conscientiously and judiciously; judiciously and strictly according to the facts of the case here and to the law relating to libel suits. And it goes without saying to you gentlemen of the jury, that no political prejudice or bias that you may have towards the Reform Party or other party which opposed the Reform Party, if those were the two parties of the country, or towards the Mechanic's Union or the Hui Kalaiaina, should in this action, the controversy between individuals, have any weight whatever.

There are two methods of redressing injuries which one is supposed to receive by publications in a newspaper which arouse angry feelings and are supposed to inflict injury; one by personal castigation, personal assault sometimes proceeding to the last degree of assassination; the other, is by recourse to the courts of law, I need not say that the last is the proper way, and that when suits are brought, as I may say, conscientiously into courts of law, they are to be very carefully considered.

This complaint I ruled in the beginning of the case, or soon after the beginning, at the close of the plaintiff's case, you will find to be of and concerning this plaintiff, D. M. Crowley. I think any other ruling than that would be considered by you to be extremely technical and throwing him out of Court without an opportunity to try his case. It is in three branches, the first charging that Mr. Crowley who has been shown to be D. M. Crowley, "was engaged in the upholstering business in this city a few years since in partnership with Mr. Hastie. The firm became involved and made an assignment for the benefit of its creditors. A day or two before the assignment Mr. Crowley and his partner sewed up a lot of valuable furniture covering, fringes, etc., in bagging and it was hidden in an upstairs back room under Crowley's bed. A list of the firm's property was then delivered to the assignee, omitting the secreted goods. A few days later Mr. Crowley and his partner had a falling out and the partner gave information which led to the discovery of the goods. Mr. Crowley then admitted it was firm property, but claimed that he had 'forgotten all about it.'"

It is not contended by the defendant that these words are not libellous *per se*; that is, in themselves, and therefore it is not necessary to claim special damage for having published them. An injury is presumed without an allegation that the plaintiff was injured in his credit, his business, his character, his feelings or in any way that would do him a money damage, or a damage which should be compensated by money. Then comes the question of justification.

If the statements here were true and published not maliciously, I think that it is understood here, what maliciously means, seeking out even true incidents in the private lives of private men might be maliciously published. But it is claimed here that it is not maliciously done, Mr. Crowley being a man before the public and this occurring in a political campaign and this paper being the organ of the party opposed to Mr. Crowley. Is it true? It requires proof, and I charge you that it requires satisfactory proof that it was true. I will not quite say that it requires proof that would convict Crowley of the crime of as I may say, embezzling his own goods, embezzling goods that had been delivered to the assignee in a way by that list, for on a trial for the crime reasonable doubt and many other things come in to acquit a person so charged, but it must be satisfactory proof to you that it was true. Then it being proved to you to be true and published without malice, no damages could be given as to this statement. I will merely call your attention to the different parts of it again: "The firm became involved and made an assignment for the benefit of its creditors and that Mr. Crowley and his partner sewed up a lot of valuable furniture covering, fringes, etc., in bagging." Whether it is proved that Mr. Crowley did that along with Hastie who is not on trial here in any way makes no difference. "That it was hidden in an upstairs back room under Crowley's bed." Of course the gist of the offense is not that it was Crowley's bed, but it would be a very strong circumstance if it had been Crowley's bedroom and under his bed to bring it home to him. There is evidence before you as to whether it was Crowley's room at all. On the other hand, there is testimony, and it is testimony in defense by the plaintiff in rebuttal of Mr. Cavanaugh as to the way it was deposited there by the other partner. Then the next item is that a list of the firm's property was delivered to the assignee, omitting the secreted goods. The truth of that you have heard. The list has not been and cannot be produced and that is nothing to charge Mr. Atherton or to imply that he has withheld a paper. It is an old transaction, very old transaction, done with so far as the business part of it is concerned with the creditors and it might not be produced, so that you lack certainty the certainty of proof which the paper would afford itself. Mr. Atherton has testified, I understood, according to that list which was produced here that these articles had been included in it and then taken away from the goods; that is for your consideration, whether it is so proved; that the goods were on the list and then abstracted; that a few days later Mr. Crowley and his partner had a falling out, that I have no doubt that has been proved, and the partner gave information. No matter who gave information in this case, the information is not before you in this case. That in consequence of the information Mr. Atherton made some search there with some others and they were found there; that Mr. Crowley then admitted that it was firm property but claimed that he had "forgotten all about it." There is a broad conflict, and it is for you to be satisfied from all the testimony and all the circumstances that Mr. Crowley did admit having done it, having secreted the goods. So that upon this first item of the complaint you would find a verdict for damages for the plaintiff if it is not proved satisfactorily to your minds that it is true, and further that if true the publication was without malice, and in regard to that a proof of want of malice would go in connection with the truth of it to relieve the defendant from damages altogether. It would further go, if it didn't do that, to a mitigation of damages. Of course publication would have a different application under one state of circumstances as to malice and a different one under another. It says under our statute, and it is the statute relating to criminal prosecutions for libel, which this is not, that: "In every prosecution for writing or publishing a libel, the defendant may give in evidence in his defence upon the trial the truth of the matter contained in the publication charged to be libelous; provided, however, that such evidence shall not be deemed a justification, unless it shall be further made to appear on the trial that the matter was published with good motives and for justifiable ends."

Coming to the second part of the complaint, that, "After this little episode Mr. Crowley took to stumping the country in the interest of temperance reform under the auspices of W. C. T. U. This palled upon his tastes after awhile and he proceeded to organize a troup of native hula girls at Kohala. He thought that the show would 'take' better if the girls were dressed in silk tights and opera boots. He accordingly ordered them through a Honolulu merchant, but as his credit was not sufficient to get them, he induced a Kohala friend to guarantee payment. Meanwhile 'Hawaiian Opera' did not pay the dividends expected of it. The tights came, Mr. Crowley left his friend in the lurch and the friend had to pay for them. That friend has very 'sober recollection' of the event."

As to the charge that the plaintiff in this case proceeded to organize a troupe of native hula girls and to get tights for them and so on, that is not in itself libellous *per se*, there would have to be a special allegation of damages. I will illustrate: It might not injure him in the upholstering business, might not injure a man to have been engaged in the show business, even in a low class show business. The point is that he does not allege specially that it did injure him in his business, and unless there is an allegation of that kind he could not recover. It would undoubtedly injure very much the character we will say of any minister of religion and of many other persons in society and in professions; I think it would injure a lawyer as well; it would injure a judge to have it said that he had been in some low show business, or a show business we will say, but a person in alleging such a libel would have to set forth his injury, and allege, for instance, that it had prevented him from getting employment in his profession, or caused his discharge from his situation. But there is no allegation in this complaint that the plaintiff has been injured in his business by it being published of him that he had organized or attempted to organize a hula troup.

The latter part of the charge, however, is libellous *per se*, because it makes a charge against his credit, and if it injured the credit of a tradesman, I take it for granted that it is not to be controverted that Mr. Crowley is a tradesman, a man doing business to some extent upon credit, at all events that injury to his credit would be an injury to him, so it is not necessary to set that forth here. And it is said, that Mr. Crowley left his friend in the lurch and that his friend had to pay for him. It also said, that his credit was not sufficient and he induced the Kohala friend to make the payment. That part would be libellous, the other part is not; that is, there is no special damage alleged for it.

The third article relating to his interviews with Mr. Thurston, the Minister of the Interior, is: "Mr. Crowley being a prominent leader of the Mechanic's Union, went to a member of the Reform Party and stated that it would be easy to break up the Union," and so on, and treated for a bribe or a purchase for a thousand dollars, a purchase of his honor or integrity, but I take it that it does go to his credit financially in any business in which he might be engaged, in his business as a tradesman, a mechanic, working and dealing, buying and selling stock, and unless this should appear to your minds to be true and published with a good purpose he would be entitled to damages for this publication of the third article.

I do not propose to speak at great length, and I believe I have given or refused to give all the charges asked for.

Now, if you should find that those things which I have stated to be libellous *per se* are not true, or published with no good end or motive, you would have to consider the amount of damages; that is a matter that rests very much with the jury. You are not to be carried away with sentimental considerations, you are to consider so far as possible what would be fair damages if you should find such. I may say that the amount named or claimed is no guide whatever to the amount that you should award beyond this, that you cannot give in excess of it, for a person bringing a suit could put in what he pleases to ask for; Mr. Crowley could have put in fifty thousand or a hundred thousand dollars. There is no proportion necessary; that is to say, the claim for fifty thousand does not entitle claimant to fifty thousand or a quarter of it.

Mr. Crowley's rights are to be carefully regarded, as I stated to you in the beginning, and you are to consider any other principles which I have laid down. Whether he is entitled to damages and if so, in what amount. The amount, as I have said, can range from the lowest amount which you please to give plaintiff to the amount claimed. You are to bear in mind throughout that if you should find that these libellous matters are not true, how far there is a justification or rather, a mitigation by the form of publication.

Mr. Hatch offering a correction as the statement of Mr. Atherton's testimony, the Court said it would leave it to the jury to remember what Mr. Atherton said. Mr. Crowley's list had not been produced. The list in evidence was that made by Mr. Atherton, with an addition of the goods found in the bedroom.

Supreme Court, Hawaiian Islands.

JANUARY TERM, 1891.

IN THE MATTER OF W. C. ACHI, AN ATTORNEY AT LAW.

JUDD, C. J., M'CULLY, BICKERTON AND DOLE, J. J.

OPINION OF THE COURT PER JUDD, C. J.

During the trial of a cause in this Court at the January Term, 1891, a witness gave some evidence alleging misconduct on the part of W. C. Achi, Esq., an attorney of this Court. He was notified orally by the presiding Justice to appear on the last day of the Term and answer the charges made by the witness, as shown by the minutes of the evidence taken.

Mr. Achi appeared, and his counsel moved the Court for a more specific charge.

We are of opinion that this motion should be granted. The statute under which the Court is empowered to admit persons to practice, prescribes also that, "practitioners shall be summarily amenable to the Courts of record, and may be fined, imprisoned or dismissed from the roll of practitioners, for satisfactory cause, upon complaint of parties aggrieved by their malpractice, or for non payment of moneys collected by them for private parties or for any deceit, or other gross misconduct." Comp. Laws, p. 312.

In the case before us the alleged misconduct was not committed in open Court, nor is there before us any formal complaint by a party aggrieved thereby.

It is not essential to the administration of the disciplinary power of the Court over its licensed practitioners that a formal complaint be made in every case by a party aggrieved. The matter may come to the notice of the Court in the progress of a trial. Ordinarily the Court would call the attention of the Attorney-General to the matter and request that charges be preferred, which being done a Rule to show cause would issue. But where the Court has heard a case based upon misconduct of an attorney and has passed upon the facts, an order to show cause based upon the decree could issue, without the intervention of the Attorney-General. *In the matter of Geo. W. Wool*, 36 *Mich.* 300.

The attorney is entitled to have the proofs sustaining the alleged misconduct presented and be afforded an opportunity of meeting them. The principles laid down *in the matter of Eldridge*, 82 *N. Y.* 161, and *matter of H. Boluss*, 28 *Mich.* 507; *matter of Mills*, 1 *Mich* 393, are ample authority for this practice, and it accords with the precedents in this Court.

The facts upon which the alleged misconduct is based, not having been an issue in a case passed upon by the Court and not occurring in the presence of the Court, the Court requests the Attorney General to prefer specific charges against the attorney, upon which a Rule to show cause may issue.

L. A. Thurston for the motion.
Honolulu, February 6, 1891.

Abstract of Titles.

Mr. Henry E. Cooper, who arrived by the Australia, is here to work upon a subject that will be hailed with considerable satisfaction by attorneys and business men in general. Mr. Cooper is at present engaged in making an abstract of all titles of real estate in the kingdom. The only method at present of finding the title for property is by searching the index, thereby finding but part of the property's title. With Mr. Cooper's system all the transfers affecting any property by whomsoever conveyed, will be shown as on a page of a ledger or "Lot Book."

Supreme Court, Hawaiian Islands. In Banco.

JANUARY TERM, 1891.

MARIA GOMAZ DA SILVA vs. JOAQUIN GOMAZ DA SILVA.

PETITION FOR SEPARATION,

ON APPEAL FROM MR. JUSTICE M'CULLY.

JUDD, C. J., M'CULLY, BICKERTON AND DOLE, J. J.

OPINION OF THE COURT BY BICKERTON, J.

The petition in this case sets out that the parties were married in Honolulu in December, 1889. That differences began to arise between them about one week after the marriage. That the respondent since the said marriage has excessively and habitually ill-treated the petitioner and generally abused her and driven her from their house, and in consequence thereof she has on several occasions been forced to seek shelter and protection from her friends and relations. That the petitioner has suffered much abuse from the parents of the respondent in his presence. That respondent refuses and neglects to provide the petitioner with the necessaries of life and that she has no means to employ counsel and to pay costs.

The petition prays that a decree from bed and board be granted her, and that she be allowed five dollars per week alimony and seventy-five dollars for counsel fees, costs and expenses of proceedings.

The answer of the respondent admits the marriage and denies all the allegations in the petition, and alleges that petitioner left respondent and went to reside with her parents, with her and their own free will and consent. And further, that respondent is without money, property or means to support himself or his wife or both; that he has been and is engaged in learning a trade, but without wages; that he and his wife have heretofore been supported by his parents, brothers and family, and that he is unable otherwise to provide for his wife and himself; that he is unable to pay any costs of Court or counsel fees, and prays that the petition be dismissed.

This matter came on for hearing before Mr. Justice McCully in May, June and July, 1890, and on August 2d the petition was dismissed, and the case now comes here on a general appeal.

A separation from bed and board may be decreed for the following causes:

"1. For excessive and habitual ill-treatment of the one party by the other;

"2. For habitual drunkenness of either party;

"3. For refusal or neglect of the husband to provide his wife with the necessaries of life." Comp. Laws Sec. 1336, p. 440.

The petitioner relies on the first and third causes, and as they are denied by the respondent the burden of proof is on her, (the petitioner).

"In a suit brought for a separation, the defendant shall be permitted to prove in justification the ill-conduct of the complainant, and on establishing such defense to the satisfaction of the Court, the suit may be dismissed."

Comp. Laws, Sec. 1337, p. 440.

From the evidence we find at the time of the marriage of these parties the petitioner was nearly eighteen years of age and the respondent about twenty-one, and although he had been employed up to November, 1889, he at the time of the marriage had no employment, or means, and was dependent on his family for support, and has been so ever since he being employed learning a trade without wages. The petitioner must have known these circumstances at the time, and that the only home he had to take her to was that of his parents. It is fair to presume that she knew this, for there is no allegation or attempt to show that she had been deceived by the respondent; she had accepted the situation with her eyes open, and she was bound to submit to it, even if it was not a pleasant one. She should not show the independence and resistance which the evidence shows she did, for she and her husband were both dependent on the husband's family. It is unfortunate that young people will place themselves in such positions, but when they do they must abide the results.

The evidence as to the excessive and habitual ill-treatment of the petitioner is almost entirely confined to her own testimony; the other testimony for the petitioner is very slim and uncertain in its nature and leaves the case in a very infirm way for supporting the allegation of excessive and habitual ill treatment.

The evidence for the respondent rebuts very strongly the petitioner's case, and shows considerable ill conduct on her part, and substantiates the respondent's answer as to his want of means and inability to support his wife; and that he is dependent on his family for the support of himself and wife, also, that he is unable to comply with the order in regard to costs and counsel fees. The husband should endeavor as soon as possible to support his wife, and the wife should do all in her power to assist him.

We are of opinion that the showing mode in the case fully warranted the Court in finding that there was not sufficient reason shown for making a decree of separation.

Appeal dismissed.

A. Rosa for petitioner; W. A. Whiting for respondent.
Honolulu, Feb. 9, 1891.